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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Docket No.

MARTYN C. MERRITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

==========

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court in sentencing a defendant pursuant to a plea agreement may draw adverse inferences against the defendant for his refusal at such sentencing proceedings to provide information which would incriminate him as to other as yet unfiled criminal charges arising from the same pattern of conduct, and, whether once this defendant raises the Fifth Amendment privilege as grounds for his refusal to do so, the court may then penalize the defendant by a severe upward adjustment of his sentence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Martin C. Merritt respectfully requests that a *Writ of Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming the Petitioner's sentence imposed

including upward departure of the sentence subsequent to Petitioner's plea of guilty, pursuant to a plea agreement and resulting from several hearings held thereupon.

The offense to which Petitioner pled guilty and for which he was sentenced was a one count violation of 18 U.S.C. §371, conspiracy to defraud the United States.

OPINION BELOW

The opinion of the Unites States Court of Appeals for the Second Circuit in slip opinion is reproduced in the appendix hereto at Petitioner's Appendix 1a to 37a. The opinion is found at _____ F.2d _____ (2d Cir. 1993) and no petition for rehearing was filed relating thereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. The United States Court of Appeals for the Second Circuit affirmed all provisions of Petitioner's sentence on February 9, 1993, and this petition is timely filed within ninety (90) days thereafter.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that no person subject to the laws of the United States shall be compelled to give self-incriminatory testimony:

> "[n]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Petitioner, who was charged in November, 1990 by a twelve count indictment filed in the Southern District of New York, elected to plead guilty to one count of violating 18 U.S.C. §371., conspiring to defraud the United States, specifically, the Agency for International Development (AID). Pursuant to the to the plea agreement, the stipulated base offense level was 17 and Petitioner agreed to make available prior to sentencing, "all personal and corporate financial information requested by the government."

On May 31, 1991, Petitioner entered his plea of guilty to the single 18 U.S.C. §371 count pursuant to the plea agreement. Subsequent thereto, the District Judge held a further hearing on the issue of restitution.

A major issue at such hearing was whether Petitioner controlled a particular account at Banque Worms in London and the funds therein, such funds having been therein deposited from a Xanthus Corporation account at Exchange National Bank of Chicago.

At issue also was an entity known as Broadview Development Corporation, an Isle of Jersey (U.K.) company which held title to Petitioner's residence at 87 Broadview Avenue, New Rochelle, New York, but in which Petitioner claimed he had no financial interest.

As reflected in the Second Circuit Opinion, Petitioner's Probation Officer noted that despite Petitioner's "alleged sale to Broadview" of his residence, Petitioner continued to deduct property taxes and mortgage interest regarding the Broadview property.

At the September 26, 1991 hearing, one Irwin Shustak, Esq., who acted as Assistant Secretary for Broadview Development, Ltd. (the Jersey Company), testified that a "foreign tax was paid to the Internal Revenue Service (IRS)" because the seller (Broadview) was a foreign corporation." Mr. Shustak also testified that he delivered certain checks to Petitioner's spouse, Mary Anne Merritt that were "closing proceeds." payable to Broadview.

Since the issue at this September 1991 hearing was both a.) a possible upward adjustment to Petitioner's sentence (based on his alleged possible obstruction of justice for continuing to retain the proceeds of the crime). and b.) a possible lack of a two point credit for "acceptance of responsibility", Petitioner's "willingness to come forward became critical.

At this stage of the sentencing hearing, the court below stated to Petitioner's counsel:

> ...I think in fairness [to Petitioner's counsel] I should let you know that as I view the record, certainly, were this a jury trial, I would be instructing the jury on the uncalled witness. I do not have that memorized, but it says in substance: if there is a person who has relevant evidence who is available to only one side, then you may infer if the evidence is not presented that the testimony would be unfavorable.
>
> I view Mrs. Merritt as certainly falling within that framework of the principle and think that on this record since her name is all over the critical records and since the matter of privilege prevents her from being called by the government, but is no obstacle to her being called by the defense, that I may in these circumstances draw an in inference against your client from the failure to call her."

At this juncture Petitioner's counsel argued that he had submitted a brief to the Court the previous day addressing Petitioner's Fifth Amendment rights upon

these issues, and that "[m]any of those concerns are equally applicable to Mrs. Merritt. She was a target of the grand jury.

A subsequent hearing was held by the lower court on October 10, 1991, during which Petitioner's Probation Officer testified that he had "various consultations with the Internal Revenue Special Agents" regarding the propriety of Petitioner's tax return deductions for mortgages and interest payments." In testifying, Petitioner's Probation Officer noted that Petitioner had denied to him any financial interest in Broadview Development, Ltd. and "[t]hen I saw [Petitioner's] tax returns that indicated otherwise."

When Petitioner's counsel pointed out to the Court that no substantial evidence had been presented by the government to show Petitioner's ownership

of Broadview, the Court stated:

> "I've considered those arguments. I note that there is no sworn testimony by your client to that effect...Do you want him to testify?"

In response to which Petitioner's counsel stated as follows:

> "...you are inviting him [Petitioner] to waive his constitutional right in the that regard and then you are penalizing him for not doing it."

Clearly, during all of this testimony, as well as that taken at the preceding hearing, it was clear that on the facial issues of restitution, acceptance of responsibility, and upward adjustments for obstruction of justice, Petitioner stood in serious risk of other criminal charges of tax evasion and money laundering if his "truthful testimony" would have shown he had any interest and/or control of the Banque Worms account or Broadview Development, Ltd.

On these issues, not only was his wife 's risk the same on similar, but her potential testimony on these potential on these issues was shielded by the spousal privilege.

Subsequently, the as set forth in the decision of the Second Circuit "[T]he trial court emphasized that Petitioner's obstruction of justice had continued well after his plea of guilty," and Petitioner was given a two point upward adjustment for obstruction of justice, given no credit for acceptance of responsibility and was given a one point upward adjustment for danger to public health. Finally, pursuant to §5K2.0 Petitioner was departed upward to the statutory maximum of sixty (60) months because "of his continued fraudulent scheme to retain the proceeds of his crime."

On appeal, Petitioner urged the Second Circuit that his Fifth Amendment privilege was trammelled upon, and urged the appellate Court that the trial judge insisted Petitioner provide a "link in the chain of evidence to prosecute [Petitioner] for money laundering or tax evasion."

The Second Circuit either misperceived this argument or chose not to address it, for in facing Petitioner's Fifth Amendment arguments, the Court made no mention of the exposure of Petitioner to either money laundering or tax evasion charges, had he chosen to testify at his sentencing hearings.

REASON FOR GRANTING WRIT

This petition rests upon a principle of common law jurisprudence more sacred than the Magna Carta and directly resultant from the excesses of the Star Chamber the fundamental principle that unlike the proceedings known to the Inquisition, one cannot under any circumstances be compelled to testify against himself or herself.

This point was driven home by an obscure young lawyer named Francis Scott Key in his representation of Vice President Aaron Burr before the designated presiding judge, Chief Justice John Marshall. In this regard, we find language drawn directly from *United States v. Burr*, (C.C.Va.) F. Case No. 14692e:

> "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime and no witnesses may be compelled to furnish any one of them against himself."

A defendant cannot be compelled to give testimony against himself unless the compelled testimony and its fruits cannot be used, in any manner, by federal officials in connection with a criminal prosecution of that defendant. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964).

As is evident from the factual pattern present at Petitioner's sentencing hearing, in testifying about any and all matters touching upon the Banque Worms account and Broadview Development, Petitioner would have been compelled to give testimony which realistically would most likely be used against him to demonstrate possible money laundering and/or tax evasion.

The Fifth Amendment protects a witness or defendant reasonably who reasonably apprehends could be used in a

criminal prosecution or that could lead to other evidence that may be used. *Application of Gault*, 387 U.S. 1, 12 L.Ed.2d 527, 87 S.Ct. 1428 (1967).

The testimony of Petitioner's Probation Officer establishing the jaundiced view of the IRS Special Agents regarding Petitioner's tax deductions concerning the Broadview property demonstrates the reasonableness of Petitioner's Fifth Amendment fears, enhanced no doubt by sound advice of counsel.

This Court has held that the Fifth Amendment privilege applies to a governmental attempt to compel from a defendant evidence of a testimonial or communicative nature. *United States v, Wade*, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1296 (1967), and has further held that an individual is not required to aid in the discovery production or authentication of

incriminating evidence . *Andersen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976).

Petitioner suggests that he was subject to the violation of both these principles in his sentencing proceedings. As his counsel case it he was 1.) being invited to waive his Fifth Amendment privilege and 2.) then being penalized for not doing so.

This Court, through an opinion written by our present Chief Justice, has made clear that the test for application of the Fifth Amendment privilege is whether the claimant is confronted by substantial and real, not merely trifling or imaginary hazards of incrimination. *United States v. Apfelbaum*, 445 U.S. 115. 63 L.Ed.2d 250, 100 S.Ct. 948 (1980) quoting *Brown v. Walker*, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896).

Petitioner suggests to this Court most respectfully that if his own apprehensions based on advice of counsel did not give the imprimatur of veracity to his concerns, the IRS interest in the matter reflected by the testimony of his Probation Officer certainly did.

The Fifth Amendment is absolute, in prohibitory application in terms of self incrimination and it does not distinguish degrees of incrimination. See: *Rhode Island v. Innis,* 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980).

The Second Circuit, in its Opinion, reasoned "[i]n the first place, Merritt had waived his Fifth Amendment privilege as to information regarding his fund by agreeing, as part of his plea bargain, to disclose all his financial information to the Government and court."

While this may be true in the abstract, it can only be true to the crime to which he pled - 18 U.S.C. §371 conspiracy count. For it is well established in the law and recognized in our circuit courts, including the Second Circuit that while a guilty plea waives the Fifth Amendment privilege for the crime charged, this waiver is to be limited only to the crime in question. *United States v. Gloria,* 494 F.2d 477 (5th Cir. 1974); *Krogmann v. United States,* 225 F.2d 220 (4th Cir. 1965); *United States v. Chase,* 281 F.2d 225 (6th Cir.1960), and *United States v. Miranti,* 253 F.2d 135 (2nd Cir. 1958).

In terms of any possible issue as to whether or not Petitioner had viable and realistic Fifth Amendment claim, *Hoffman v. United States* 341 U.S. 479, 95 L.Ed.2d 1118, 71 S.Ct. 814 (1950) in citing *Feldman v. United States,* 222 U.S. 487

providing for a "liberal construction" of the privilege "in favor of the right it was intended to secure" and citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892) as well as *Arndstein v. McCarthy*, 254 U.S. 71 (1920), clearly establishes that Petitioner's Fifth Amendment concerns were indeed well grounded.

In this regard, it is clear that the privilege extends to answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Blau v. United States*, 340 U.S. 169, 95 L.Ed.2d 170. 71 S.Ct. 223 (1950).

A witness or defendant need only have "reasonable cause to apprehend danger from a direct answer". *Mason v. United States*, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917).

Hoffman, supra, tells us at Pg. 486 that:

> "To sustain the privilege it need only be evident from the implementation of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Petitioner should not only try to bring these issues into the "modern era" of the "guidelines" and demonstrate how the Fifth Amendment applies to sentencing proceedings but should also demonstrate a division of circuit on this same issue, if possible, to obtain relief from this Court.

Petitioner believes this can be done by reference to an acquittal of issue in the Ninth Circuit with a different outcome honoring the privilege. The case is *United States v. Sitton*, 968 F.2d 947 (9th Cir. 1992)

In *Sitton, supra*, the case of *United States v. Ronald Lee Dewbre.* was consolidated for appellate purposes. Dewbre

claimed that at sentencing the district court had improperly denied him a two point reduction for acceptance of responsibility.

Dewbre insisted upon not discussing his case prior to appeal, and an attempt to compel him to do so violated his Fifth Amendment right against self incrimination.

The Ninth Circuit in *Sitton, supra*, agreed with Dewbre and in relying on *United States v. Watt*, 910 F.2d 587, 592 (9th Cir. 1990), determined that "the court may not consider against the defendant any constitutionally protected conduct" (Emphasis added.)

The Ninth Circuit remanded for resentencing because "[w]e are unable to determine whether the denial [of acceptance of responsibility] was consistent with Dewbre's constitutional right."

Petitioner here respectfully suggests that the damage done to him here in the face of his Fifth Amendment right was far more egregious.

Not only was he denied credit, but his exercise of the privilege caused him to be treated by the court as a "missing witness" and he was penalized by severe upward adjustment from the court for the exercise of that right--all of this not in the face of a mere "prior to appeal" problem such as in *Sitton, supra*, but in the face of a very real concern that his testimony would lead to money laundering and tax evasion charges.

CONCLUSION

The mandate of the Fifth Amendment is clear - one cannot be compelled to incriminate himself as to crimes with which he has yet to be charged (and thus provide a "link" in the chain for the government to do so) under the guise of complying with terms of a plea agreement relating to the one crime to which he has agreed to plead.

Further, to penalize a defendant, at sentencing, for invoking the above privilege by severely adjusting his sentence upward in the face of his exercised privilege is violative of the Fifth Amendment, as *Sitton, supra*, tells us.

This is precisely what occurred here and is precisely what the Second Circuit failed to grasp when its opinion tells us that no Fifth Amendment violation took place because:

> "...Merritt had waived his Fifth Amendment privilege as to information regarding his funds by agreeing, as part of his plea bargain, to disclose all his financial information to the Government and the court.
>
> Second, while production can sometimes involve an incriminating act of testimonial character [analogy omitted], the same is not true of restitution payments in these circumstances. Money is fungible. The production of funds for restitution for a crime the defendant acknowledges he participated in does not implicitly acknowledge his possession of the stolen funds, especially when the defendant is a substantial businessman, like Merritt, who could be expected to have access to such a sum from sources other than the crime."

This tortured reasoning and rationale ignores the very point Petitioner had urged in his brief to the Second Circuit -- that to make any statement of ownership regarding the Banque Worms and Broadview matters would have, *ipso facto*, opens Petitioner up to charges of tax evasion and money

laundering -- crimes for which he would have incriminated himself by any such testimony.

Judge Martin did not penalize Petitioner because he did not make restitution -- for the Judge could have ordered any restitution he felt proper. Judge Martin penalized Petitioner by a severe upward adjustment for Petitioner's refusal to incriminate himself as to tax evasion and money laundering charges as the trial court record adequately reflects.

As the ghost of John Marshall knows, this egregious violation of the Fifth Amendment privilege, regardless of its semantic clothing, has been prohibited since our Constitution was framed by the Bill of Rights; the acquittal of Aaron Burr is memorialized proof.

Respectfully submitted,

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